No. 87-2088

In The

Supreme Court of the United States

October Term, 1987

KURT BLANKEMEYER and
SHARON K. BLANKEMEYER,

v. *Appellants,*

THE FEDERAL LAND BANK OF OMAHA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

JURISDICTIONAL STATEMENT

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June 1988

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THE QUESTIONS PRESENTED

The ultimate question presented is whether Nebraska Revised Statute § 40-103 is rendered invalid (and inoperative), when applied to Appellants' homestead exemption, due to a conflict with the Supremacy Clause of the United States Constitution and 11 U.S.C. § 522(f)(1), the *lien avoidance* statute of *The Bankruptcy Reform Act of 1978.*

This ultimate question involves, among others, the following subsidiary questions:

1. Whether a judgment (decree) of mortgage foreclosure and a Sheriff's Sale of real property is a "judicial lien" within the meaning of 11 U.S.C. § 522(f)(1) and 11 U.S.C. § 101(32).

2. Whether the words, "judicial lien", as employed in 11 U.S.C. § 522(f)(1) and defined in 11 U.S.C. § 101(32) were intended by Congress to be construed with a nationally uniform federal bankruptcy interpretation in mind, instead of the State of Nebraska (and each and every other State) applying its own local rules of construction and substantive law to determine the meaning and application of "judicial lien".

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES–Continued

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JURISDICTIONAL STATEMENT

Kurt and Sharon K. Blankemeyer, husband and wife (Appellants and Defendants below), appeal from the final judgment of the Supreme Court of Nebraska, denying them access to their state homestead

*All of the parties in the Supreme Court of Nebraska are listed in the caption, except the Appellee, the Dakota County State Bank, which was not a party on appeal below.

**Appellee, the Federal Land Bank of Omaha has no parent companies, subsidiaries or affiliates.

exemption through a federal bankruptcy law, the *lien avoidance* statute, and upholding the validity of a Nebraska state statute, as applied in this case, as not being in contravention of this *lien avoidance* statute (11 U.S.C. § 522(f)(1)) and the Supremacy Clause of the Constitution of the United States.

OPINION BELOW

The April 15, 1988 opinion of the Supreme Court of Nebraska is officially reported at 422 NW 2d 81, and, unofficially at 228 Nebraska Reports 249.

The official opinion appears as Appendix A, *infra*, 1a, to this Jurisdictional Statement.

JURISDICTION

This is an appeal from a final judgment entered pursuant to the decision of the Supreme Court of Nebraska holding that a state statute allowing the forced sale of Appellants' homestead exemption pursuant to a mortgage foreclosure decree and sale, is valid, while Appellants are debtors-in-possession in a Chapter 11 reorganization case in bankruptcy, have claimed and were awarded that homestead exemption in bankruptcy, and have attempted to apply the federal bankruptcy *lien avoidance* statute to remove a 'judicial lien' upon the homestead exemption.

In their *Application for Homestead Exemption*, and throughout the proceedings in the state courts, Appellants drew into question the validity of that Nebraska statute, namely, Revised Statutes of Nebraska 1943 (Reissue of 1984) § 40-103 on the ground of its repugnance to the Constitution and laws of the United States, specifically, *Article VI, Clause 2* to the *United States Constitution* (the Supremacy Clause) and 11 U.S.C. § 522(f)(1) — the *lien avoidance* statute.

Judgment was deemed to have been entered on April 15, 1988, when the decision of the court below was docketed by the Clerk of the Supreme Court of Nebraska.

A *Notice of Appeal to the Supreme Court of the United States* was filed with the Clerk of the Supreme Court of Nebraska on May 3, 1988. (Appendix B, *infra*, 15a).

This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257(2).

The cases which sustain jurisdiction are:

1. *M'Kinney v. Carroll* (KY 1838) 37 U.S. 66, 12 Pet. 66
2. *First National Bank of Guthrie Center v. Anderson* (1926) 269 U.S. 341
3. *Standard Oil Co. of California v. Johnson* (1942) 316 U.S. 481
4. *Reconstruction Finance Corporation v. Beaver County, PA.* (1946) 328 U.S. 204
5. *People of State of Illinois v. Board of Education* (1948) 333 U.S. 203

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. *Article VI, Clause 2* to the *United States Constitution* provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".

2. 11 U.S.C. § 522(e), provides in relevant part:

" . . . A waiver by the debtor of a power under subsection (f) of [this section] . . . is unenforceable in a case under this title."

3. 11 U.S.C. § 522(f)(1), provides in relevant part:

"Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is . . . (1) a judicial lien . . . ."

4. 11 U.S.C. § 101(32), provides in relevant part:

" 'judicial lien' means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding."

5. The pertinent portion of the challenged State Statute, Revised Statutes of Nebraska 1943 (Reissue of 1984) § 40-103 provides:

"Homestead; exemption; when inoperative. The homestead is subject to execution or forced sale in

satisfaction of judgments obtained (1) on debts secured by mechanics', laborers', or vendors' liens upon the premises; and (2) on debts secured by mortgages upon the premises executed and acknowledged by both husband and wife, or an unmarried claimant."

6. Revised Statutes of Nebraska 1943 (Reissue of 1984) § 40-106 provides:

"Homestead; selection; application; contents. The application must show (1) the fact that an execution has been levied upon property which is claimed as a homestead, (2) the name of the judgment creditor, (3) the facts which give rise to a homestead exemption, and (4) the value of the homestead."

7. Revised Statutes of Nebraska 1943 (Reissue of 1984) § 40-107 provides:

"Homestead; selection; application; filing; service. The application must be filed with the clerk of the district court, and a copy thereof, with notice of the time and place of hearing, be served upon the judgment creditor or his attorney of record and the officer making the levy at least ten days before the hearing. The hearing may be had before or at the hearing on confirmation of sale."

STATEMENT

1. After a Decree of mortgage foreclosure was entered on December 10, 1984 upon their 268 acre farm in Dakota County, Nebraska, Appellants subsequently were compelled to file a Chapter 11 bankruptcy reorganization case on October 29, 1985.

Appellants claimed their state homestead exemption in the United States Bankruptcy Court for the District of Nebraska pursuant to Revised Statutes of Nebraska 1943 (Reissue of 1984) § 40-101 and by virtue of Schedule B-4, *Property Claimed as Exempt*, of the official forms of the Bankruptcy Code.

In February 1986, the Appellee moved in the United States Bankruptcy Court for termination of the automatic stay pursuant to 11 U.S.C. § 362(d), which was granted. Appellee's goal was to complete the mortgage foreclosure sale, which subsequently took place on May 7, 1986, and to have the sale confirmed by the District Court of Dakota County, State of Nebraska, which occurred on June 10, 1986.

However, prior to the *Confirmation of Sale* Hearing, Appellants resourcefully commenced to undertake protection of their state homestead exemption rights in state court as previously done in bankruptcy court, fearing if they did not do so, the state court, acting with ignorance, would not protect their state homestead exemption on this farmstead.

Appellants explicitly and timely filed[1] an *Application for Homestead Exemption* (Appendix C, *infra*, 17a) pursuant to Revised Statutes of Nebraska 1943 (Reissue of 1984) §§ 40-106 and 40-107 prior to the time of Hearing on *Confirmation of Sale*.

---

[1] Revised Statutes of Nebraska 1943 (Reissue of 1984) § 40-107 allows the state homestead exemption issue to be timely adjudicated at--"the hearing on confirmation of sale"; therefore, it need not have been raised in any other earlier pleadings or proceedings in the case.

The incongruity of one Nebraska state statute, namely, Nebraska Revised Statute, Section 40-103, with the Federal Constitution and federal law, stood in Appellants' way of achieving and gaining access to their state homestead exemption in state court. Only 11 U.S.C. § 522(f)(1), the federal *lien avoidance* statute of *The Bankruptcy Reform Act of 1978* aided by the Supremacy Clause of the United States Constitution could be invoked to retrieve Appellants' $6,500.00 state homestead exemption granted to them by the United States Bankruptcy Court.

At the *Confirmation of Mortgage Foreclosure Sale* Hearing on June 10, 1986, Appellants raised the substantial federal question on the record, initially through their *Application for Homestead Exemption* and then by oral argument and briefs that they were claiming their state homestead exemption pursuant to Nebraska Revised Statute, § 40-101; that 40-101 *et seq.*, as amended, conflicted with Nebraska Revised Statute, § 40-103 in that 40-103 was superceded by the Supremacy Clause of the United States Constitution and 11 U.S.C. § 522(f)(1).

Thus, the Nebraska state District Court (the court of first instance and original jurisdiction) came to confront for the first time, a complex and atypical issue never before raised and adjudicated in any state court in the United States concerning an initial waiver of the state homestead exemption at the signing and execution of a real estate mortgage; the mortgages' subsequent foreclosure and loss of the homestead exemption through foreclosure; and then the mysterious reclamation of the state homestead exemption through the

attempted application of the *lien avoidance* statute of the Bankruptcy Code and the Supremacy Clause of the Constitution of the United States.

The Nebraska state District Court, as said earlier, confirmed the mortgage foreclosure sale to the Appellee and denied Appellants' state homestead exemption. This court passed upon the federal question raised as to the state homestead exemption by overruling Appellants' oral arguments and evidence on the record (*Bill of Exceptions* in Nebraska) and by denying, upon written *Order*, their *Application for Homestead Exemption* at the *Confirmation of Sale* Hearing.

2. From the final *Order* denying the homestead exemption and confirming the mortgage foreclosure sale (Appendix D, *infra*, 20a) Appellants appealed to the Supreme Court of Nebraska. The federal question presented on appeal to that court was the same as raised in the *Application for Homestead Exemption*and before the lower state court at the *Confirmation of Sale* Hearing.

The federal question in the Supreme Court of Nebraska was raised by way of an *Assignment of Error* as follows:

> "The District Court erred as a matter of law when it overruled Appellants' Application for Homestead Exemption".

Further, the federal question in the state Supreme Court was raised by the brief and argument of the Appellants, thus:

"Is Nebraska Revised Statute, § 40-103 rendered invalid and inoperative due to the Supremacy Clause of the United States Constitution and 11 U.S.C. § 522(f) as it applies to Appellants' homestead exemption?"

All relevant pleadings, including the *Application for Homestead Exemption*, the final *Order* denying the Appellants' state homestead exemption, and the written transcribed oral arguments and evidence on the record (*Bill of Exceptions*) of the proceedings at the *Confirmation of Sale* Hearing on June 10, 1986, raising the substantial and timely federal question were part of the entire record before the state Supreme Court.

The Supreme Court of Nebraska specifically decided against the Appellants on the federal issue(s) now presented to this Court on appeal by expressly sustaining the validity, as applied, of its own statute, Nebraska Revised Statute, § 40-103 against the challenge on federal grounds of the statute's incongruity with the Supremacy Clause of the Constitution of the United States and 11 U.S.C. § 522(f)(1) and by ruling that a "judicial lien" was not created by a decree of mortgage foreclosure in Nebraska within the meaning of 11 U.S.C. § 101(32), in order to satisfy one of the requirements of 11 U.S.C. § 522(f)(1).

In rejecting Appellants' contentions on appeal, the Nebraska Supreme Court applied and enforced to the Appellants' prejudice, a state statute which Appellants had, in their *Application for Homestead Exemption* and at all subsequent stages, insisted was, if so applied and enforced, repugnant to the Supremacy Clause of the

Constitution of the United States and 11 U.S.C. § 522(f)(1), the *lien avoidance* statute of *The Bankruptcy Reform Act of 1978*.

Since, 11 U.S.C. § 522(f)(1) mandates that the Appellants can avoid a "judicial lien" (decree of mortgage foreclosure, *et cetera*, as enumerated in 11 U.S.C. § 101(32)) that impairs their state homestead exemption, which they claimed and were awarded in bankruptcy Court and which they claimed in state court, Appellants were simply seeking to enforce their Congressionally bestowed federal rights with the aid of the Supremacy Clause by nullifying and invalidating Nebraska Revised Statute, § 40-103.

THE QUESTIONS ARE SUBSTANTIAL

The Supreme Court of Nebraska has upheld the validity of a Nebraska statute which permits the forced sale of a state homestead exemption conferred upon the Appellants and protected by law in the Bankruptcy Code, namely the *lien avoidance* statute (11 U.S.C. § 522(f)(1)), while Appellants are engaged in a Chapter 11 bankruptcy reorganization case. That Court erred in holding Nebraska Revised Statute, § 40-103 does not contravene superior federal law such as 11 U.S.C. § 522(f)(1) and the Supremacy Clause of the United States Constitution. That Court further erroneously held, as a threshold issue, that a decree of mortgage foreclosure was not a "judicial lien" within the purview of 11 U.S.C. § 101(32) and its application to the *lien avoidance* statute.

In light of the substantial, legitimate national interests served by the *lien avoidance* statute, this Court should note probable jurisdiction to review a strident exercise of state power in obstructing the operation of an Act of Congress.

Pursuant to *Article I, § 8, Clause 4* of the *United States Constitution*, granting Congress the power "[t]o establish---uniform Laws on the subject of Bankruptcies throughout the United States," and *Article I, § 8, Clause 18*, the "necessary and proper" clause, Congress has broad authority to regulate and carry into effect all aspects and phases of the national bankruptcy laws, including the *lien avoidance* statute of the Bankruptcy Code.

Never before have the questions presented by this appeal been passed upon by this Court. These questions are of profound public importance, particularly to the myriads of individuals who have claimed and sought their homestead exemptions in the several fifty States and possessions of the Union.

The Legal Profundities Of This Appeal

I.

For nearly ten years last past, a certain federal bankruptcy statute has gone completely unnoticed as to its application in the state courts to protect a bankruptcy debtor's homestead exemption in a real estate mortgage foreclosure case. Thus, the case now presented is the first of its kind ever to reach this preeminent Court.

In 1978, the Congress of the United States of America created a most unusual, but however, one of the most powerful and far-reaching statutes ever to be enacted in the Federal Bankruptcy Code, namely, the *lien avoidance* statute. (11 U.S.C. § 522(f); Pub.L. 95-598, November 6, 1978, 92 Stat. 2586.)

After ten years in total obscurity, there has been an absence of the application, or even the suggestion of the application, of this law to state court proceedings in a real estate mortgage foreclosure case.

Common knowledge to nearly every lay person, is that when one hypothecates his real estate as security for a loan debt, that person must waive his rights to the state homestead exemption. In Nebraska, this has been the law since 1879. Further, no one would suggest otherwise that that person would not also lose his homestead exemption to a forced sale in satisfaction of the foreclosed, hypothecated mortgage debt, should the latter event occur. Also, since 1879, has this been the law in Nebraska.

It would try the memories of some and the imaginations of many to determine how long the foregoing legal maxims have been the law in Anglo-American jurisprudence. One can only meditate on the diversity and disparity of statutes, in the several States of the Union, that exemplify these state homestead laws and the various mortgage foreclosure statutes that expunge these homestead rights.

Therefore, until *The Bankruptcy Reform Act* was enacted in 1978, nothing prior in the law of American

bankruptcy, or any other body of law its equal or parallel, has ever had created, such a law of colossal impact upon American jurisprudence, as the *lien avoidance* statute. It is a statute of "pure magic". For those who have never heard of or experienced its "power", it is viewed with awesome disbelief. The practical question would be, how can Congress create such a law as this which causes an effacement of long-settled rules of Anglo-American law that once a mortgage is executed on real property, the right to a homestead reclamation in a subsequent foreclosure is effaced?

Will this not re-structure and re-arrange the very substance of the mortgage lending business? Or the American (if not, the world) banking system? Since this law is a "sleeping giant", its use and the repercussions of its use could cause financial tremors from New York to Tokyo.

However, before this sounds any worse, the law has a magnanimous benevolence to those who are bankrupt, "broke", "down-trodden", and those who simply cannot "make it" to feed their "kids". For when Congress enacted this law, it had very much in mind, the concept of a "fresh start" for all those debtors in bankruptcy so they could "come away with a little more than just the shirts on their backs". Congress put into legislative policy for the first time the Biblical teaching found in Deuteronomy 15, that "every seven years, a creditor shall release a debtor from his loans". (NIV, Deuteronomy 15, v.1,2.)

The *lien avoidance* law first rose to prominence during the farm crisis that swept through Nebraska

and the Nation in 1985-86. Its application was "birthed" in a state trial court, originating with this lawyer's intent on making the law become a reality as to use.

This involved the risk of "going against the grain and bucking the system". As a general rule, no state court trial judge had ever heard of this law or experienced its application in a state court. For what more is there to the climax of a mortgage foreclosure case, but to "rubber stamp" the confirmation of the Sheriff's Sale and sell off the state homestead exemption in the process! It was a "first" for this state trial judge.

To the attorney bringing this law to the state court for application, the only question was why it had taken 10 years for its application to come about. He could only be saddened by the thousands upon thousands of homestead exemptions that have suffered effacement since 1978.

When this case arrived at the Nebraska Supreme Court after a torturous journey, a "bomb went off". At oral arguments, the state high court was incredulously "thunderstruck!" In a vitriolic opinion, that Court launched an attack against this federal law and the appeal from below to make sure the law would receive a forever-final interment.

Congress provided each State and territory of the Union with a resourceful "escape-hatch" from the impact of this law (should there be one) when it enacted the *exemptions* section of 11 U.S.C. § 522(d)(1), which provides in relevant part:

> "The debtor's aggregate interest, not to exceed $7,500 in value, in real property---that the debtor---uses as a residence---."

Nebraska "opted out" of the foregoing federal homestead exemption scheme to provide $6,500 as a homestead exemption to the Appellents. (This amount has now been raised to provide $10,000 in Nebraska--Laws 1986, LB 999, § 2, effective July 17, 1986).

Perhaps, the imagined fears of the Nebraska Supreme Court become a reality when one considers that Iowa provides a homestead exemption not to exceed forty (40) acres (Code of Iowa 1987, Chapters 561.2 and 561.16); Minnesota allows a homestead exemption not exceeding one hundred sixty (160) acres (Minnesota Statutes, Section 510.02); and the State of Colorado provides a homestead exemption of $20,000.00 (Colorado Revised Statutes 38-41-201,202), just to name a few States.

The history of the American farm derives its foundations from the Homestead Act of the 1860's when Abraham Lincoln was our President. The American farm homestead has played an integral part in this Nation's economic growth for over 120 years. It has taken well over a century to put the protection of the homestead exemption into law. This is an appropriate time for this Court to actualize the futuristic nature of the *lien avoidance* statute for the benefit of all.

II.

Appellants' subsidiary questions are of equal legal profundity.

Here again, urgent public policy requires that the Supreme Court of the United States take this case because it presents prodigious issues of national importance which ramify into the core of the national bankruptcy system as affecting potentially every State and possession of the Union and every debtor and financial institution creditor that come before the Federal Bankruptcy Court.

Unquestionably, the decision of the Supreme Court of Nebraska cannot be allowed to stand to dictate to, and control the interpretation of the law of bankruptcy and its application for each and every other State of the Union. Since the bankruptcy law is a national law, uniform everywhere in the United States, it must be construed according to the Congressional intent which was justly meant to emasculate the differences between the various mortgage forclosure statutes of the several States and the numerous statutes in every State similar to Nebraska's § 40-103 that frustrate the efficacy of the Federal *lien avoidance* statute.

It does not make any sense to define the words, "judicial lien" pursuant to 11 U.S.C. § 101(32), according to the rules of construction and the substantive law of any other State, including that of the State of Nebraska. Congress preempted this field over the several states because it was intended by the Federal Constitution to make uniform all of its *definitionary* statutes across America, rather than to permit fractionation of definition into 50 dissimilar, heterogeneous meanings and applications.

Since Congress attempted to unify and simplify the interpretation of the words, "judicial lien", it accorded the word, "judgment" in that statute, a plain, legally recognized meaning across the Nation to mean as it is usually and simply understood, as a final judicial act which adjudicates the rights and liabilities of the parties litigant, accomplished by an action at law or a proceeding in equity. This definition standardized the meaning so it would have unfettered application everywhere.

However when, the Nebraska Supreme Court defined the words, "judicial lien" according to *their* pronouncements of the law in that state, it did so by deciding the precedential law for the other 49 States and territories. Nebraska's ruling would be an efficacious denial of the "equal protection" of the law afforded by a "national" interpretation of 11 U.S.C. § 101(32) and 11 U.S.C. § 522(f)(1) to all the citizens of the remaining 49 States.

Should Nebraska's ruling be allowed to stand, an even worse fate awaits the Federal Bankruptcy Court. State statutes similar to Nebraska's § 40-103 will be interpreted as a powerful precedent to subvert the efficacy of the federal *lien avoidance* procedure, in that each and every bankruptcy Court in the 50 States will first be inclined to follow state substantive law where the bankruptcy Court sits as to the meaning of the words, "judicial lien". If it is decided according to that State's law that a judgment of mortgage foreclosure and a Sheriff's sale of real property is not a "judicial lien" encompassed within the meaning of the *lien avoidance* statute and the *definitionary* statute, this

then could result theoretically in a "denial of the intended usage" of these statutes and their application, and a frustration of the Congressional intent in practice.

If Nebraska's ruling is allowed to stand, it will stand as a judgment on the merits. Chaos will then rein. Even worse, the *lien avoidance* statute will succumb into dis-use in the state courts by the judicial fiat of one state and the statute will be rendered inefficacious.

CONCLUSION

The questions presented by this appeal are extremely substantial, novel and unique, and as has been shown, of great public importance. The case is, without question, one of first impression.

The decision of the Nebraska Supreme Court has now greatly added to the burden of further uncertain substantial Federal questions requiring resolution. That Court has returned this case with frightening conclusions of law which seriously not only challenge the powers of, but undermine the powers of the federal bankruptcy system itself. Its decision will be read by Judges everywhere to mean a final interment for the *lien avoidance* law. Never again will this law experience any vitality in practice.

It is respectfully submitted that probable jurisdiction should be noted, setting the case down for plenary briefing and argument.

Respectfully submitted,

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APPENDIX A

228 Neb. 249
The Federal Land Bank of Omaha,
a Corporation, Appellee,
v.
Kurt Blankemeyer and Sharon K.
Blankemeyer, Husband and Wife,
Appellants,
Dakota County State Bank,
Appellee.
No. 86-551.
Supreme Court of Nebraska.
April 15, 1988.

A lender brought a proceeding to foreclose on property upon debtor's failure to make required mortgage payments. The District Court, Dakota County, Robert E. Otte, J., entered a decree of foreclosure and subsequently ordered the property sold in satisfaction of the unpaid lien.The debtors appealed. The Supreme Court, Caporale, J., held that: (1) a foreclosure proceeding was not brought to create a lien, but to enforce one already in existence; and (2) homestead provision making homestead subject to execution or forced sale to satisfy judgments obtained on debts secured by mortgages on the premises executed and acknowledged by both husband and wife did not violate federal bankruptcy law or state constitutional law.

Affirmed.

1. Mortgages Key No. 380

A foreclosure proceeding is not brought to create a lien but to enforce one already in existence.

2. Bankruptcy Key No. 2785

A judicial decree of foreclosure merely confirms a preexisting consensual mortgage lien, and does not create a "judicial lien" within the meaning of federal bankruptcy lien avoidance provisions. Neb. Rev.St. § 40-103; Const. Art. 1 § 3; Art. 3, § 18; Bankr.Code, 11 U.S.C.A. § 522(f),(f)(1).

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law Key No. 300(2)
Homestead Key No. 91

Provision stating that the homestead was subject to execution or forced sale in satisfaction of judgments obtained on debts secured by mortgages upon the premises executed and acknowledged by both husband and wife did not unconstitutionally prevent debtors from enjoying the fruits of federal bankruptcy law, and thus did not deprive them of their homestead property without due process. Neb.Rev.St. § 40-103; Const. Art. 1, § 3; Art. 3, § 18; Bankr.Code, 11 U.S.C.A. § 522(f), (f)(1).

4. Homestead Key No. 91
Statutes Key No. 82

Provision which made homestead subject to execution or forced sale in satisfaction of judgments obtained on debts secured by mortgages on the premises executed and acknowledged by both husband and wife merely recognized that some debtors might wish to waive their homestead exemption when mortgaging

land in order to increase their borrowing power and thus did not grant any special or exclusive privileges to lenders. Neb.Rev.St. § 40-103; Const. Art. 1, § 3; Art. 3, § 18; Bankr.Code, 11 U.S.C.A. § 522(f), (f)(1).

Syllabus by the Court

1. Foreclosure: Liens. A foreclosure proceeding is brought not to create a lien but to enforce one already in existence.

2. Foreclosure: Homesteads: Mortgages: Constitutional Law. Neb.Rev.Stat. § 40-103 (Reissue 1984), providing that the "homestead is subject to execution or forced sale in satisfaction of judgments obtained . . . on debts secured by mortgages upon the premises executed and acknowledged by both husband and wife . . . ," neither contravenes 11 U.S.C. § 522(f)(1) (1982) nor violates Neb.Const. art. I, § 3, or art. III, § 18.

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Gregory N. Lohr, for appellee Federal Land Bank of Omaha.

HASTINGS, C.J., and BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, J.J.

CAPORALE, Justice.

Defendants Kurt and Sharon K. Blankemeyer, husband and wife, appeal from the order of the district court denying them a homestead exemption in certain land and confirming its sale, pursuant to a prior decree of foreclosure, to plaintiff-appellee, The Federal Land Bank of Omaha. The Blankemeyers assert the district court erred in failing to find Neb.Rev.Stat. § 40-103 (Reissue 1984), which provides that the "homestead is subject to execution or forced sale in satisfaction of judgments obtained . . . on debts secured by mortgages upon the premises executed and acknowledged by both husband and wife . . . ," violates federal law, as well as Neb. Const. art. I, § 3, and art III, § 18. We affirm.

The Blankemeyers mortgaged their improved 268 acres of farmland in Dakota County, Nebraska, to the bank. At that time each of them executed and acknowledged the mortgage contract, which provides that each relinquished "all rights of homestead" in the mortgaged premises.

After a time, the Blankemeyers failed to make the required mortgage payments. As a consequence, the district court entered a decree of foreclosure and subsequently ordered the property sold in satisfaction of the unpaid liens. The bank purchased the land at the sheriff's sale. In the meantime, the Blankemeyers had filed for protection under the federal Bankruptcy Act and, at the hearing to determine whether the sheriff's sale to the bank should be confirmed, claimed the homestead exemption in question.

It should be noted that the Blankemeyers do not question the factual bases for confirming the sale; their

attack is solely a legal one, claiming that § 40-103 contravenes superior federal law and violates the Constitution of this state.

Section 40-103 is part of a larger statutory scheme found at Neb.Rev.Stat. §§ 40-101 to 40-118 (Reissue 1984), which creates and defines the limits of this state's homestead exemption in bankruptcy and forced sale. By the enactment of Neb.Rev.Stat. § 25-15,105 (Reissue 1985), Nebraska rejected the federal bankruptcy exemption scheme; consequently, state exemptions, including the homestead exemption, "apply to any bankruptcy petition filed in Nebraska after April 17, 1980."

The homestead exemption, as applicable to the Blankemeyers, is defined at § 40-101:

> A homestead not exceeding in value six thousand five hundred dollars, consisting of the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village . . . . In the Blankemeyer's view, § 40-103 is in conflict with 11 U.S.C. § 522(f) (1982), which provides:
>
> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such a lien is –
>
> (1) a judicial lien. . . .

Section 522(b) (Supp. II 1984) and its cross-reference, 11 U.S.C. § 541 (1982 & Supp. II 1984), are not at issue.

In sum, the thesis of the Blankemeyer's first argument is that the bank's foreclosure of their defaulted mortgage somehow created a "judicial lien" which may be avoided in bankruptcy under § 522(f)(1), notwithstanding the waiver of homestead exemption which the Blankemeyers executed as part of their mortgage contract with the bank.

The definition of "judicial lien" is found at 11 U.S.C. § 101(32) (Supp. IV 1986): " 'judicial lien' means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." Conversely, according to § 101(33), " 'lien' means charge against or interest in property to secure payment of a debt or performance of an obligation." Further, under § 101(45), " 'security interest' means lien created by an agreement."

The federal bankruptcy court for the northern district of Iowa has considered the very argument the Blankemeyers urge upon this court. In *In re Miller*, 8 B.R. 672, 673 (Bankr.N.D. Iowa 1981):

> The issue [was] whether the foreclosure of a mortgage [on real estate] pursuant to Iowa law converts the consensual mortgage lien into a judicial lien that may be avoided pursuant to § 522(f)(1) of the Bankruptcy Code.
>
> This court concludes that a transformation does not take place and no such result was intended by Congress when it enacted the section in question.
>
> . . . .
>
> The legislative history of this section sets out the purpose of subsection (f), which is to " 'protect the debtor's exemptions, his discharge, and thus

his fresh start by permitting him to avoid liens on exempt property. The debtor may avoid a judicial lien on any property to the extent the property could have been exempted in the absence of the lien . . . ' "

. . . .

The legislative history of [the code section which defines "lien"] provides: "In general, the concept of lien is divided into three kinds of liens: judicial liens, security interests, and statutory liens. Those three categories are mutually exclusive and are exhaustive except for certain common law liens."

There is nothing in the legislative history of the Code that would indicate that Congress intended that a diligent creditor who obtained a judgment in foreclosure with respect to his security interest would thereby lose his rights through avoidance in bankruptcy proceedings by the use of § 522(f)(1). It seems clear that the provision for avoidance of judicial liens was meant to apply to judgments obtained on debts that would otherwise be unsecured.

Neither the language of the Code definitions nor the legislative history suggests that a mortgage lien is avoidable merely because it has been established by judgment in a foreclosure action. The lien of the mortgage was not "obtained" by judgment, levy, etc. As the language of the decree suggests, the lien of the mortgage was simply "established" by the judgment. The mortgage lien was neither extinguished by the foreclosure decree nor merged into the judgment of the foreclosure decree. Nor is there any contention here that [the mortgagee] has, by its actions, waived its consensual mortgage lien.

See, also, *In re Gugenhan*, 55 B.R. 507 (Bankr.D.Kan.1985) (equitable mortgages were not

"judicial liens" and could not be avoided by chapter 11 debtors under § 522(f)(1); *In re Grosso*, 51 B.R. 266 (Bankr.D.N.M.1984) (judicial liens were avoided under § 522(f)(1) to the extent that they impaired debtor's bankruptcy residence exemption, and debtor would be entitled to that exemption except to the extent that he had voluntarily impaired it through a consensual lien given to secure an unliquidated note for attorney fees); *In re Hart*, 50 B.R. 956 (Bankr.D.Nev.1985) (lien, representing former husband's equity in marital residence, arose either by virtue of an express agreement between husband and debtor or by the imposition of an equitable lien to carry out the parties' intent under the divorce decree and, as such, qualified as a security interest rather than a "judicial lien" and was not avoidable under § 522(f)(1)); *In re Simonson, 44 B.R. 269 (Bankr.M.D.Pa.1984),aff'd* 758 F.2d 103 (3d Cir.1985) (where debtor's property was fully encumbered even without judicial liens which had been avoided, debtors could not preserve judicial liens for their own benefit and could not fill shoes of judicial lienholders to the detriment of second mortgagee); *In re Boyd*, 31 B.R. 591 (Bankr.D.Minn.1983), *aff'd Boyd v. Robinson*, 741 F.2d 1112 (8th Cir.1984) ("judicial lien", as contemplated by § 522(f)(1), is an interest which encumbers a specific piece of property granted to a judgment creditor who was previously free to attach any property of the debtor's to satisfy his interest but who did not have an interest in a specific piece of property before the occurrence of some judicial action).

[1] As this court noted in *Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp.*, 192 Neb. 588, 592, 223

N.W.2d 425, 428 (1974), "A foreclosure proceeding . . . is not brought to create a lien but to enforce one already in existence."

In their reply brief to this court, the Blankemeyers are particularly vituperative in their criticism of *In re Miller*, 8 B.R. 672 (Bankr.N.D.Iowa 1981), stating, through counsel, that they "would not rely upon *Miller* to be the law. Nor . . . cite it for authority to be the law for which it purportedly stands. *Miller* appears to stand alone. It is a 'maverick'." Reply Brief for Appellants at 3. The Blankemeyers refer this court to five cases, attaching copies thereof to their briefs, which they claim support their position that *Miller* is a legal aberration. Reviewing each of these five cases, we find:

In re Schmidt, 119 Bankr.L.Rep. (CCH) ¶ 69,708 (Bankr.N.D.Ohio Jan. 20, 1984), does not stand for the proposition that foreclosure of a mortgage constitutes a judicial lien under § 522(f)(1). In *Schmidt*,

> The property in question is the debtor's residence which has an appraised fair market value of approximately $78,000.00. The property is encumbered by two mortgages totalling approximately $70,825.68 leaving the debtors some $7,174.82 of equity. The debtors claim homestead exemption in the real estate of $10,000.00. 11 U.S.C. § 522(b)(2)(A); Section 2329.66(a)(1) of the Ohio Revised Code. The judgment lien which is the target of debtor's avoidance effort is for approximately $14,000.00. The narrow question which arises is how much of the judicial lien may the debtors avoid pursuant to 11 U.S.C. § 522(f)(1). . . .

¶69,708 at 84,320. Not only is the *Schmidt* record devoid of any indication that the "judicial lien" somehow arose from the mortgage mentioned above, but the facts suggest the contrary. The *Schmidt* homestead was subject to mortgages in the amount of $70,825.68; the "judgment lien" complained of was in the amount of $14,000. This disparity strongly suggests that the lien at issue in *Schmidt* arose from some source other than the mortgages.

Dominion Bank of the Cumberlands, NA v. Nuckolls, 780 F.2d 408 (4th Cir.1985), involved a perfected security interest asserted by Dominion Bank in the debtor's restaurant equipment, not a mortgage on real estate. Under Virginia law, " '[e]very householder or head of family residing in [Virginia] shall be entitled . . . to hold exempt . . . real and personal property, or either, to be selected by him, . . . to the value of not exceeding $5,000.' Va.Code Ann. § 34-4(1984)." 780 F.2d at 410. The court of appeals notes:

> In the loan agreement . . . the Nuckolls expressly waived "the benefit of any homestead exemption to protect property from being used by [the Bank] to pay off the loan. . . ." Under Virginia law such a waiver is enforceable against the debtor. . . . The Nuckolls argue nonetheless that section 522 of the Bankruptcy Code allows them to claim the exemption despite their waiver. . . . We feel . . . that the waiver was properly avoided under . . . section 522(f).

780 F.2d at 411. However, the court of appeals did not rely upon § 522(f)(1) but, rather, upon § 522(f)(2)(B), which provides that

> [n]otwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is . . . (2) a nonpossessory, nonpurchase-money security interest in any . . . (B) implements, professional books, or tools, of the trade of the debtor. . . .

Clearly, *Nuckolls* is inapposite to the Blankemeyers' contention that a judicial decree of foreclosure against mortgaged real estate is a "judicial lien" within the meaning of that phrase in the Bankruptcy Code. Indeed, the *Nuckolls* court cites *In re Ballard*, 5 B.R. 570 (Bankr.E.D.Va.1980), for the contrary proposition; the dictum in *Nuckolls* is to the effect that

> a debtor's waiver of the Virginia homestead exemption as to certain real property could not be avoided pursuant to section 522(f) because the security interest "is not a judicial lien nor does the real estate qualify for the exclusion of personal property listed in § 522(f)(2)(A), (B), and (C)."

780 F.2d at 413.

In *In re Jaxtheimer*, 36 B.R. 786, 119 Bankr.L.Rep. (CCH) ¶ 69,701 (Bankr.S.D.Fla.1984), the lien complained of arose from a money judgment won against the debtor and subsequent judicial raising of an equitable lien in favor of the judgment creditor in the debtor's real property. As noted earlier, a money judgment is not involved in the case before us; rather, a foreclosure of a consensual mortgage lien is involved.

In *In re Sajkowski*, 49 B.R. 37, 151 Bankr.L.Rep. (CCH) ¶ 70,538 (Bankr.D.R.I.1985), the federal bankruptcy court for the district of Rhode Island held that "[t]he federal homestead exemption covers a debtor's proceeds from a Chapter 7 trustee's sale of the home postpetition. Exemptions are determined at the time the bankruptcy petition is filed. Additionally, properly construed, Section 522(d)(1) applies to the value of the debtor's equity in the residence." (Syllabus of the court.) This holding illuminates the scope of the federal homestead exemption, not the scope of the phrase "judicial lien" in § 522(f). As noted earlier, Nebraska has rejected the federal bankruptcy provisions, preferring its own list of exemptions. § 25-15,105. The question posed in this case is not addressed in *Sajkowski, supra*. Furthermore, nothing in the opinion indicates that either of the two liens complained of in *Sajkowski, supra*, arose by mortgage foreclosure.

Finally in *In re Princiotta*, 49 B.R. 447, 152 Bankr.L.Rep. (CCH) ¶ 70,563 at 87,112 (Bankr.D.Mass.1985), the bankruptcy court held that "a rather curious" land sale contract gave the debtor rights in the real estate against which an exemption could be taken "pursuant to 11 U.S.C. § 522(d)1 and (5) (1979)," and judgment liens against this property were avoided under § 522(f). *Princiotta* did not involve foreclosure of a mortgage against the property, nor the question in this case: Does a judgment of foreclosure create a "judicial lien"?

[2] Contrary to the Blankemeyer's rather stridently expressed opinion, the bankruptcy court's holding in *In re Miller*, 8 B.R. 672 (Bankr.N.D.Iowa 1981), is well

reasoned and well supported in the cases. The Blankemeyers have failed to bring to this court's attention, nor has independent research unearthed, any case law whatsoever in support of their position. It is clear that a judicial decree of foreclosure merely confirms the preexisting consensual mortgage lien, *Northwestern Mut. Life Ins. Co. v. Nebraska Land Corp.*, 192 Neb. 588, 223 N.W.2d 425 (1974), and does not create a "judicial lien," as that term is used in § 522(f)(1). The Blankemeyer's first argument is without merit.

The Blankemeyers next contend that § 40-103 violates the mandate of Neb. Const. art. I, § 3, that no person be deprived of property without due process of law.

[3] The gist of the Blankemeyer's second argument is that § 40-103 unconstitutionally prevents them "from enjoying the fruits of 11 U.S.C. § 522(f)," thereby depriving them "of their homestead property without due process of law." Brief for Appellants at 12. In view of our resolution of the Blankemeyers' first argument, it is clear that their second argument is equally without merit.

[4] Finally, the Blankemeyers contend that § 40-103 violates Neb. Const. art. III, § 18, in that it immunizes the bank from the application of § 522(f), gives the bank a "very special privilege not accorded others in the same class," and "directly and bluntly discriminates against" the Blankemeyers. Brief for Appellants at 13.

In relevant part, Neb. Const. art. III, § 18, prohibits the Legislature from granting any "corporation,

association, or individual any special or exclusive privileges, immunity, or franchise whatever. . . ." Our analysis of the Blankemeyers' first argument disposes of the first aspect of this third argument. Section 40-103 does not immunize the bank from the operation of § 522(f); the federal statute simply does not apply. As to the remaining two aspects of their third argument, the Blankemeyers profess astonishment at the notion that "[i]f a judgment debtor owes, for example, $1,000.00 upon an ordinary debt, his homestead property cannot be subjected to a forced sale or an execution. But if the same judgment debtor owes $1,000.00 for a mortgage debt, his homestead can be sold if he does not pay up." Brief for Appellants at 14. We observe, however, that creation of the power to foreclose and levy upon a homestead, although authorized by statute, is achieved not by statute but by agreement between the parties. Thus, in permitting mortgage liens held by "appellee and other banks and financial institutions" to reach their debtor's homestead property, the Legislature has not granted anyone special or exclusive privileges, immunity, or a franchise but, rather, has merely recognized that some debtors may wish to waive their homestead exemption when mortgaging land in order to increase their borrowing power. The Blankemeyers' third argument is therefore as devoid of merit as were the other two.

Since the judgment of the district court is correct, it is affirmed.

AFFIRMED.

APPENDIX B

KURT BLANKEMEYER and SHARON K. BLANKEMEYER, Appellants, v. THE FEDERAL LAND BANK OF OMAHA, Appellee.	Case No. 86-551 (Filed May 5, 1988) (Clerk of District Court)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Kurt Blankemeyer and his wife, Sharon K. Blankemeyer, Appellants above named, hereby appeal to the Supreme Court of the United States from the final Judgment of the Supreme Court of Nebraska, which affirmed an Order Denying Appellants' Homestead Exemption in this case on April 15, 1988.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Dated: April 30, 1988.

Respectfully submitted,

/s/ William J. Rieb
WILLIAM J. RIEB
P.O. Box 1682
Sioux City, Iowa 51102
(402) 494-5353

Attorney for the Appellants.

RECEIVED
MAY 3, 1988
SUPREME COURT OF
NEBRASKA

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that he mailed a true and correct copy of "Notice of Appeal to the Supreme Court of the United States", upon the only party required to be served, namely, the Appellee, The Federal Land Bank of Omaha, by serving its attorney of record, Gregory Lohr, at P.O. Box 717, Sioux City, Iowa 51102, on the 30th day of April, 1988, by depositing the same in the U.S. Mail at the U.S. Post Office in Sioux City, Iowa, with first-class postage thereon prepaid.

Dated: April 30, 1988.

/s/ William J. Rieb
William J. Rieb

APPENDIX C

IN THE DISTRICT COURT OF
DAKOTA COUNTY, NEBRASKA

THE FEDERAL LAND BANK OF OMAHA, A Corporation, Plaintiff, vs. KURT BLANKEMEYER and SHARON BLANKEMEYER, a/k/a/ SHARON K. BLANKEMEYER and DAKOTA COUNTY STATE BANK, Defendants.	Case No. 40-12 APPLICATION FOR HOMESTEAD EXEMPTION

COME NOW, Kurt Blankemeyer and Sharon K. Blankemeyer, Defendants, by and through their attorney, William J. Rieb, of George Qualley, P.C., and apply to this Honorable Court as follows:

1. Said Defendants are entitled to claim and do claim pursuant to the Nebraska Homestead Law Sections 40-101, et. seq., as amended, the following described 160 acres of homestead lands, to-wit:

> --The South ½ of NW ¼ of Section 14, Township 28 North, Range 8 East of the 6th P.M., and the South East part of the NE ¼ of Section 15, consisting of all land lying East of Highway 35 except the Northernmost Ten acres of Section 15, Township 28 North, Range 8 East of the 6th P.M., all situated in Dakota County, Nebraska.--

2. The value of the 160 acres is in the area of $155,000.00.

3. The above lands and other lands were sold at sale on May 7, 1986, in Dakota City, Dakota County, Nebraska.

4. The name of the purchaser of these homestead lands and of the judgment creditor is The Federal Land Bank of Omaha.

5. The facts which give rise to the homestead is that the Defendants Kurt and Sharon K. Blankemeyer and their two minor children live and reside on this homestead land previously described above. The homestead consists of a dwelling house and appurtenant farm buildings and the surrounding lands.

6. These Defendants, Kurt and Sharon K. Blankemeyer, are also Debtors-in-possession in a Chapter 11 Reorganization Case in U. S. Bankruptcy Court in Omaha, in Case No. BKY 85-2490. They are claiming these homestead lands as an Exemption in Bankruptcy Court also, which has jurisdiction pursuant to the Supremacy Clause of the U. S. Constitution, which supercedes Neb. Rev. Stat. 40-103.

WHEREFORE, said Defendants, Kurt and Sharon K. Blankemeyer, ask this Court to determine their homestead and set it aside to them according to law. That this matter be heard at confirmation hearing on May 20, 1986.

Dated: May 16, 1988.

/s/ William J. Rieb
BY: William J. Rieb
Neb. Atty. Reg. No. 17897
GEORGE QUALLEY, P.C.
1400 Pierce Street
Sioux City, Iowa 51105
(712) 255-7937

ATTORNEYS FOR APPLICANTS,
KURT AND SHARON K.
BLANKEMEYER

COPIES SENT TO:

Sheriff of Dakota County
Dakota County Courthouse
Dakota City, NE 68731

Mr. Gregory N. Lohr, Esq.
Attorney at law
P. O. Box 3163
Sioux City, IA 51101

APPENDIX D

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

THE FEDERAL LAND BANK OF OMAHA, A Corporation, Plaintiff,	)	CASE NO. 40-12
vs.	)	ORDER
KURT BLANKEMEYER, ET AL, Defendants.	)	

Entered in Court Journal 52 at Page 542 on 6-19-86.

ON the 10th day of June, 1986, the Application for Homestead Exemption of Kurt Blankemeyer and Sharon Blankemeyer came on for hearing before the Court. The Court finds that Kurt Blankemeyer and Sharon K. Blankemeyer are claiming a homestead exemption on property which was encumbered by a Mortgage of The Federal Land Bank of Omaha. This Mortgage was foreclosed in a Decree of Foreclosure entered by this Court on December 10, 1984. The Court further finds that the property to which the Blankemeyers are claiming a homestead exemption was sold at sheriff's sale on May 7, 1986.

The Blankemeyers are now requesting that this Court withhold confirmation of sheriff's sale to allow the Blankemeyers to avoid the lien of Plaintiff on the homestead property. Blankemeyers argue that the Foreclosure Decree and sheriff's sale of the property constitutes a judicial lien which may be avoided by the Bankruptcy Court under Title 11 U.S.C. Section 522(f).

The Court finds that the Decree of Foreclosure and sheriff's sale of the property does not qualify as a judicial lien under Title 11 U.S.C. Section 522(f). The Court concludes that the Application for Homestead Exemption filed by Kurt Blankemeyer and Sharon K. Blankemeyer should be overruled. The Court concludes that Section 40-103 of the Nebraska R.R.S. is not unconstitutional which theory has been raised by the Blankemeyers.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Application for Homestead Exemption filed by Kurt Blankemeyer and Sharon K. Blankemeyer be and is hereby overruled.

The next thing before the Court is Plaintiff's Motion to confirm the sheriff's sale held herein. After receiving testimony from Plaintiff's witnesses, hearing statements of counsel, and otherwise being fully advised in the premises, the Court finds that the sheriff's sale in this matter was fairly conducted and that the premises sold for a fair price under the circumstances and conditions of the sale and that a subsequent sale would not produce a greater price. The Court also finds that the sale was conducted in conformity with law and that proper notice of the sheriff's sale has been published pursuant to law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the sale of the real estate involved herein is approved, ratified and confirmed and that the Sheriff of Dakota County, Nebraska, is hereby ordered

and directed to make, execute and deliver a Deed conveying the premises involved to the purchaser at such sale, The Federal Land Bank of Omaha.

THE COURT
BY /s/ Robert E. Otte
District Judge

Entered in Court Journal 52 at Page 543 on 6-19-86.
